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ABSTRACT

The concept of institutional academic freedom is discussed. Attention is directed to how the concept confounds the distinct values and standards traditionally used in analysis of cases involving individual rights in higher education, and legal and practical problems it raises for the maintenance of traditional concepts of academic freedom. The idea of institutional academic freedom--to the extent that it may not derive directly from the First Amendment--appears to grow from the general idea of university autonomy. The various courts have approached the question of latitude for institutional decision-making from different points of view about whether there is a corporate academic freedom, when and in what circumstances it should be invoked, and what ends the freedom serves. Whatever else academic freedom may be, in legal terms it is a derivative of the constitutional protection afforded free expression. The issue at hand is whether in the derivation one can find a protection for institutions as well as for individuals. Basic issues include: prohibition of governmental infringement, and the conflict of institutional discretion with public law and policy. In general, the notion of institutional academic freedom has achieved only a very qualified recognition among state and federal courts. (SW)

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ACADEMIC FREEDOM FOR UNIVERSITIES ?*

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University autonomy, freedom of expression, and academic freedom are basic values whose histories are quite separate, yet related in certain ways. Recent developments in the law have seemingly confounded these concepts with potentially significant implications for the traditional definitions associated with each. This paper will explain the emergence of a concept identified as "institutional academic freedom," show how it confounds the distinct values and standards traditionally used in analysis of cases involving individual rights in higher education, and identify both legal and practical problems it raises for the maintenance of traditional concepts of academic freedom.

Institutional academic freedom.

Institutional academic freedom has emerged as a living concept based on Justice Powell's opinion in the Bakke case.[1] At issue in that case was the discretion of the University of California's Davis Campus to use racial and other criteria in making admission decisions. The university's policy objective, attainment of a diverse student body, was found to be a legitimate objective. Once establishing the legitimacy of the objective, the Court next turned to a balancing test to weigh the university's application of racial criteria against the candidate's right to be treated in a race-neutral fashion. The key legal development which emerged in the Court's application of the balancing test was a weighting of the university's interests with a heavy presumption of First Amendment liberties. For the majority , Justice Powell wrote, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of the university to make its own

judgments as to education includes the selection of its student body."[2]

Academic freedom was firmly associated with the First Amendment by Chief Justice Warren's opinion in Sweezy v. New Hampshire,[3] but academic freedom has never been explicitly defined as one of the rights granted under the First Amendment.[4] Moreover, academic freedom, to the extent that it enjoys a First Amendment protection, has generally been construed as an individual liberty, not a corporate one.[5] By contrast, religious freedom and freedom of the press -- fundamental liberties enumerated in the First Amendment -- have been applied to the corporate interests which exercise these forms of protected expression.[6]

The Sweezy opinion is a curious (but apparently typical[7]) piece of legal reasoning by Chief Justice Warren. Without reference to either the text of the Constitution or to precedent, the opinion declares, "The essentiality of freedom in the community of American universities is almost self-evident....To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.[8] Quite separately, the opinion goes on to discuss the presumably distinguishable right to freedom of political expression, a right explicitly "enshrined in the First Amendment."[9] Because Sweezy involved an individual's liberty -- specifically the right not to answer certain questions about political associations and beliefs -- it seems to have been assumed that Chief Justice Warren had the freedom of individual academics in mind when he so sweepingly described the idea of academic freedom. Yet the language of his opinion can be read to grant academic freedom to the "community of American universities."[10] In this language have his successors apparently found the room to construct such a freedom.

The Warren opinion in Sweezy was a plurality -- not a majority -- opinion. Justice Frankfurter (joined by Justice Harlan) wrote a concurring opinion that is being revived and relied upon with some frequency as the source of the idea of "institutional academic freedom."[11] Most importantly, the Frankfurter concurrence was relied upon by Justice Powell in Bakke.[12] The more recent (1981) Supreme Court decision in Widmar v. Vincent further delineated and defined the concept -- still relying on the Frankfurter concurrence.[13]

Justice Frankfurter took a strong stand against "governmental intrusion into the intellectual life of a university."[14] He cited not specific legal precedent but "a vast body of literature" in support of his position.[15] His prime source was a plea from senior scholars at two South African universities for the government of that nation to respect "'four essential freedoms of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" [16] He based his argument for an institutional freedom on sound government policy aimed at achieving a larger social good, namely the pursuit of understanding.[17] This, too, seemed to be at the heart of Chief Justice Warren's principal concern.[18] Both opinions, in fact, referred to the difficulty of establishing truth in the social sciences and to the vulnerability of these fields to the imposition of political dogmas and orthodoxies.

Sweezy, then, has been read -- taking the plurality and concurring opinions together -- as providing wide latitude for something called academic freedom. But Sweezy does not necessarily tie academic freedom explicitly to the Constitution or to other legally cognizable precedent.

Rather, the presumption is created that universities should be free from government intrusion because the public policy reasons for creating universities require a freedom to nurture intellectual inquiry. Little doubt can remain, however, after a close reading of the Sweezy opinions -- majority and concurring -- that the authors did not distinguish cleanly the freedom of the individual scholar from the freedom of the academic community.

The circumstances under which the Sweezy case developed need to be recognized. At issue was the compulsion of a professor's testimony by a New Hampshire legislative committee. Government pursuit of alleged subversives in the 1950's (the time of Sweezy's trial) was at least zealous, and at worst a malicious vendetta against those with political beliefs to the left of center.[19] Sweezy's situation was hardly representative of more normal times; it was instead an example of one aberrant period of government excess in our nation's history. It is fair, therefore, to ask whether the justices whose words were later used to advance the idea of corporate academic freedom for institutions contemplated a more benign era and a radically different public policy environment. It can also be pointed out that the justices were focussed on the task of protecting individual freedoms -- in this case Professor Sweezy's political freedom. In point of fact, the University of New Hampshire was not directly involved; it could be argued that the freedom contemplated by the Court was indeed a purely personal freedom, perhaps deserving of some greater latitude because individuals in academic institutions customarily enjoy the protection afforded them by their affiliation with a corporate entity that exists to promote free exchange of ideas.

The Court's most recent statement on corporate academic freedom emerged in dicta in Justice Powell's opinion for the majority in Widmar v. Vincent.[20] (Both the Frankfurter concurrence in Sweezy and the Powell opinion in Bakke were cited as precedent.[21]) It is clear that other values can outweigh academic freedom, as freedom of religious expression did in this case. Here, despite the Court's acknowledgment that wide latitude should be granted to academic institutions, individual students' rights to freedom of expression proved to be the more powerful interest. Justice Powell affirmed "the right of the University to make academic judgments as to how best to allocate scarce resources or to 'determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[22] (Note the expansion of Frankfurter's four freedoms to include allocation of scarce resources.) He further affirmed the right of the university to exclude even protected expression if it were disruptive or not conducted in conformity with valid rules.[23] But he declined to expand the idea of corporate academic freedom vis-à-vis the "fundamental principle that a state regulation of speech should be content-neutral."[24]

Justice Stevens, in concurrence, appeared to wish to broaden the corporate freedom idea. He argued that universities have a legitimate interest in the content of speech, and indicated that he would not hold universities to the same standards of content-neutrality as government in general should the issue arise. He indicated that the notion of institutional academic freedom would, in his view, permit an academic judgment as to the appropriateness of providing a forum for any topic -- content being a legitimate consideration. Stevens did, however, suggest

that content-neutrality would be required with respect to speech in a properly constituted and recognized forum.[25]

Both Bakke and Widmar now provide Supreme Court precedent for a presumption that a corporate academic freedom exists. The concept is not derived from orthodox Constitutional roots or reasoning. Rather it seems to derive initially from Chief Justice Warren's sense of sound public policy toward universities, the rather large target provided by heavy-handed government witch hunts in the 950's, and a plea to keep South African universities free from government intrusion during the same era. If corporate academic freedom is (or should be) a right protected directly or indirectly by the First Amendment, the derivation of the right as outlined in Justice Powell's two opinions has yet to be explicitly and unambiguously drawn.

Given, however, that there is at least a presumption regarding this freedom, Widmar raises the most important question about its place in the panoply of protections afforded under the Constitution: If corporate academic freedom exists, how fundamental a right is it? Particularly, how is this freedom to be weighed against fundamental freedoms of speech, assembly, religion, and press that protect individuals against state infringements? Is corporate academic freedom an intervening or overriding right when weighed against the academic freedom of an individual scholar? Both practical and theoretical issues accompany the emergence of the concept.

University autonomy.

The idea of institutional academic freedom -- to the extent that it may not derive directly from the First Amendment -- appears to grow from the general idea of university autonomy. The two ideas may point toward

similar ends, namely restraint on government intervention in academic decision making, yet they can be shown to be different in certain respects. For example, Rashdall's account of medieval university origins suggests that the issue of autonomy for these institutions had more to do with the politics of control than it did with any direct concern about unfettered search for truth.[26] At Bologna, for example, the issue of alien students' citizenship led to delegation of substantial civil, "and sometimes even criminal," jurisdiction to university authorities (who in actuality were officers of the student guild itself).[27] The University at Bologna thus had attributes of a separate political entity within the state, but it should be noted that this measure of autonomy did not benefit directly the academic freedom of teaching or inquiry. In fact, the faculty at Bologna were hired by and taught at the pleasure of the student guild.[28] Rashdall suggests that the Bolognese student guild's autonomy was achieved in a practical compromise with commercial interests; students could enter Bologna to study, ally themselves with the guild, and sidestep the issue of allegiance to the state; the state would allow foreign students to gather for purposes of study and thus mollify the commercial interests who benefited from the presence of the university.[29]

At Paris it seems that ecclesiastical power (and perhaps arrogance) were behind the university's autonomy. In essence, the university held the power to control lectures and sermons delivered throughout Paris.[30] Since ecclesiastical authority answered only to the King, Parliament could not control the university. Thus, freedom to teach and inquire could be neither protected nor breached by secular government. Rashdall

points out that the university ultimately abused its control through "outrageous and precipitate" efforts to secure its privileges.[31] This led to its subjection to Parliament's jurisdiction via a royal edict in 1446.[32] The lesson of Paris is that autonomy for the corporate university may actually lead to suppression of intellectual freedom and to outrage against the interests of the broader community as represented by the State.

In the modern state, the issue of university autonomy often has less to do with the free pursuit of ideas and knowledge than one might believe. In fact, the issues are not radically different from those of Bologna and Paris. State control is exercised in a variety of ways -- often with political overtones, and often with little or no impact (either way) on the freedom to teach, learn, or inquire.

There are, in the American system, myriad degrees of university autonomy.[33] Although each institution may be found to enjoy a specific degree of autonomy, several classes of corporate form for American colleges and universities may be identified, and the general implications for corporate autonomy outlined. In general, the federal government takes no direct responsibility for university education or for university or college incorporation. Rather, each of the fifty states has provided under its own laws for the establishment, management, and accountability of colleges and universities. Some of these states have provided for universities in their constitutions.[34] While the constitutional university may be relatively free from legislative or executive intervention, it is not totally free. In matters of fiscal, personnel, and property management, for example, the public constitutional university may have to be subordinate to the powers of other branches and agencies of government to which authority over these matters has been delegated.[35]

Private universities represent a remarkably diverse case with respect to autonomy. Grove City College, at one extreme, refuses to accept federal funds in assertion of its purely private character.[36] Other colleges and universities, chartered as independent non-profit institutions, accept large portions of their budgets from state and/or federal sources via grant and contract arrangements.[37] Some private college charters predate the Constitution, with unique implications for autonomy.[38] Others have been founded and chartered under the stricter and more intrusive licensing and inspecting powers of state government.[39] Publicly created and supported colleges are usually statutory creatures of the legislature or of municipal ordinances. Although statutory institutions may seem vulnerable to intervention, they may have had substantial delegations of authority to their boards and/or officers. Such authority can be revoked or altered, to be sure, but not without adherence to (usually) elaborate procedure.[40]

In the sense that colleges and universities are either creatures of the state or accountable to it for many legitimate purposes, they cannot be said to enjoy either theoretical or practical autonomy. Yet courts have granted considerable latitude to colleges and universities for several consistently recognized reasons. Most generally, courts will defer to the legitimate delegation of powers to boards and officers of institutions of higher education. The primary standard employed in reviewing the exercise of discretionary power is that of establishing a clear abuse. In the celebrated case of Bertrand Russell's appointment to the City University of New York faculty, the court -- while ordering the appointment revoked and ordering Russell discharged -- acknowledged the university's broad

discretion to appoint faculty regardless of their views.[41] The court said it found an abuse of discretionary authority insofar as Russell had expressed views in conflict with New York's criminal code.[42] The court acknowledged that academic freedom was at issue, but held it to be a subsidiary consideration to protection of the "public health, safety, and morals," pointing out that there could be no absolute immunity from judicial review.[43]

The principle is now a well-established one: college and university authorities have been delegated broad powers and they enjoy considerable discretion to exercise those powers -- constrained by public law, standards of good faith, and by the fundamental rights of individuals.[44] Among the principles by which exercise of delegated power is judged is the acknowledged place of free expression in the academic community.[45] What is new, in one sense, is the emerging standard of academic freedom for the academic community as a different point of departure in assessing the exercise of discretionary power.

The university's professed need to provide an environment of academic freedom in which intellectual inquiry can go forward requires the discretion it has been granted. Presuming that a university is protected from judicial review -- in whatever way that presumption is articulated -- by institutional claims to academic freedom is analytically distinct. It is on this point that confusion may occur. It is clear that universities have the discretion to provide for academic freedom.[46] It is also clear that public policy honors the provision of academic freedom in universities.[47] But under traditional standards of review of discretionary powers, it is less clear that exceptions, privileges, immunities, or special treatment can (or should) be based on the new claim by universities to corporate academic freedom.[48]

A second ground on which the university enjoys some measure of autonomy is closely related to the delegation of discretionary power. For the most part, universities are presumed to have the required expertise to make academic judgments concerning students and personnel decisions regarding faculty. The Supreme Court's decision in Horowitz pointed out that, for this reason, academic decisions are the sole province of the academic community.[49] (It was not made clear that an academic institution is required to make any particular due process protection available to students dismissed for academic reasons.) Likewise, courts have been extremely reluctant in some cases to substitute their judgment for that of committees or individuals charged to make academic personnel decisions.[50]

In these cases, university autonomy for decisions with academic content has not been defended by reference to corporate academic freedom, per se. There has been, instead, a recognition that judges lack the specific knowledge and expertise required to make academic decisions. The result is a now-common judicial reluctance to enter the academic sphere in a substantive way. It is not a reluctance based upon an academic privilege or on any corporate immunity. It is rather a realistic acknowledgment that the expertise for academic decisions rests in academic hands.

University autonomy has never been absolute, nor has it been based necessarily on academic freedom. American universities enjoy varying degrees of autonomy, depending on the manner in which they have been incorporated, chartered, or created. Their discretionary powers vary, too, but courts have shown a clear and continuing reluctance to interfere with the legitimate and non-abusive exercise of delegated authority, and they ordinarily defer to academic expertise in making certain kinds of decisions. Thus it can be shown that under traditional theories colleges

and universities enjoy considerable latitude, if not complete autonomy, to make those decisions which most directly affect its academic operations. If such autonomy exists, and if such autonomy has been tested vis-á-vis individual rights -- as it has been many times -- and if government interests have been legitimately arrayed and tested against that autonomy -- as they have been many times[51] -- then the argument for expanding and protecting university autonomy under a newer theory of corporate academic freedom needs to account for whatever inadequacies may exist under the traditional theories. Such an accounting does not seem to have been offered in the key decisions on this new corporate freedom.

Academic freedom.

The traditional concept of academic freedom as it enjoys a measure of constitutional protection provides for individual freedom from constraints imposed by the state or federal government, including the public university as a state governmental agency.[52] Likewise, the concept of academic freedom as defined by the academic community provides for the individual professor's right to teach and conduct research free from certain constraints. Significantly, the widely endorsed 1940 A.A.U.P. Statement on Academic Freedom and Tenure specifies the rights of professors and provides for the protection of these rights through establishment of tenure.[53] Although it is clear in the terms of the Statement that the interests of the institution can be distinguished from those of the professor, it is just as clear that those interests are potentially contrary to the "free search for truth and its free exposition."[54] Thus there was conceived to be a need for protecting the intellectual freedom and the economic security of professors from "institutional censorship or discipline."[55]

The 1940 Statement has, in some cases, been treated as the common law of academic life -- in others as a contractual standard adopted via incorporation in institutional policy.[56] In either event, academic freedom is a term of art referring to substantive or procedural protections afforded to individual professors in their socially sanctioned pursuit of truth. Subscription to the 1940 Statement by a wide array of learned societies, by many associations of colleges and universities, and by many institutions which have adopted the Statement as policy or have adopted substantially parallel language in their own rules and regulations, implies that the corporate university recognizes the need for voluntary self-restraint in asserting interests which may be counter to those which professors pursue in their exercise of intellectual freedom.

If there can fairly be said to be a "common law" of the academic community, it is that "academic freedom" is defined as and exists for protection of individual faculty from intrusions by institutions or broader political and/or secular interests.[57] The concept of a corporate academic freedom -- much less the articulation of a cognizable privilege or immunity -- has not been developed in the same fashion. (The 1940 Statement did recognize the institution's right, for religious or other policy reasons, to limit academic freedom. But this institutional right was not identified as an instance or appendage of academic freedom.)

Institutional academic freedom vs. rules of evidence.

As it has now developed, the notion of institutional academic freedom has been an issue in several disparate cases. There has yet to emerge either a clear definition of the concept or a consistent standard for its application. Further, the courts appear to differ on the point

of whether the "freedom" exists, or whether there are merely strong interests at stake and legitimate public policy reasons for protecting a measure of academic autonomy.

The question regarding existence of an institutional academic freedom was answered firmly in the negative by the Fifth Circuit Court of Appeals in Dinnan.[58] The case deserves attention because the Supreme Court has denied certiorari, leaving the ruling intact.[59] At issue was Professor Dinnan's refusal to reveal his vote in a tenure decision at one of the University of Georgia System campuses. He chose jail over revelation in a now celebrated episode, and as the question ultimately developed in court, the existence of an academic freedom privilege against disclosure of his vote under existing rules of evidence became a central issue.[60]

First, the court found no such privilege in the common law of evidence. It also found no statutory privilege that could be applied.[61] While acknowledging that academic freedom had been recognized as a "transcendant value,"[62] the court also pointed out that certain limitations had been developed: academic freedom cannot, for example, be used as a defense where some superordinate individual right is at stake -- in this case the right to be free from discriminatory treatment.[63] In fact, the court explicitly notes that the kind of academic freedom defense proposed could have the effect of thwarting individual rights protected under the First Amendment.[64] Weighing the institution's legitimate discretion to select candidates for employment or promotion against the "truth-seeking function of our justice system," the court found that the latter "must prevail over the novel privilege [against disclosure under the Federal Rules of Evidence] claimed by appellant."[65]

This decision pointedly refused to find a constitutional issue, choosing instead to categorize it as a rules-of-evidence decision. It allowed for no constitutionally contrived defense based on academic freedom, and seems to have found that the only interest at stake on the institution's side was its administrative discretion in faculty personnel matters, an interest (not a fundamental constitutional right) that could not supercede otherwise settled rules of law.

A closely analogous decision involved the City University of New York's decision to deny promotion and reappointment to Prof. Simpson Gray. The Second Circuit overturned a lower court ruling denying Gray's motion to compel discovery of certain votes in the University's tenure committee proceedings.[66] The lower court had reasoned that "academic freedom is a value which the Supreme Court has found to be of constitutional significance."[67] Noting further the generally recognized rationale for tenure as the "linchpin in the commitment to safeguard the academic freedom of individual teachers," and noting the role of peer review in the operation of the tenure system, the court concluded that it was essential to preserve the confidentiality of the process.[68] Damage to the process, the court concluded, would outweigh any benefits of disclosure.[69] The lower court ruling did not speak directly to the issue of institutional academic freedom, but saw rather a threat to the system designed to assure protection of individual faculty rights to academic freedom.[70] Thus, although the district court saw an academic freedom element in the justification for a privilege, this element was quite distinguishable from any institutional protection based on academic freedom.

The Second Circuit, in reversing, similarly distinguished between institutional and individual academic freedom. At bottom, the court held, "academic freedom is illusory when it does not protect faculty from censurious practices but rather serves as a veil for those who might act as censors."[71] The court was careful to acknowledge the significant place of academic freedom in First Amendment cases, and implied that a limited judicial infringement via discovery in civil rights cases could actually lead to a more effective protection of individual rights.[72] It took note of the A.A.U.P. guidelines on non-renewal of faculty, pointing out that the provision of reasons for non-renewal was -- in the Association's view -- a legitimate trade-off against the discovery of individual committee members' votes.[73] In Gray's case, those reasons were not provided. The court's posture led it not toward an institutional privilege, but toward protection for the individual faculty member involved.

The earliest case in this line appears to be McKillop v. Regents of the University of California, a tenure denial case, and one that was persuasive in the lower court's ruling in Gray.[74] The McKillop decision allowed an evidentiary privilege against disclosure of personnel files. The issue of "academic freedom" did not arise directly. However, the court did take note of the preeminence of the University of California among its peer institutions, and asserted that the peer review system of faculty appointments was responsible.[75] On this ground alone, it would appear, the court found it a "necessity" to preserve the confidentiality of faculty personnel records.[76] Although there has been some subsequent interpretive assessment of this decision as one which implies an institutional academic freedom privilege,[77] it is not clear

that the decision itself ever finds a constitutional ground for protecting the university's interest in maintaining confidentiality. The finding refers instead to the California Evidence Code, and follows the evidentiary model of judicial discretion in balancing the needs for disclosure and confidentiality.[78]

Rules of evidence decisions have thus yielded mixed results as to the existence and derivation of a privilege against disclosure based on institutional academic freedom. The extent to which they recognize or imply such a privilege -- or base it on constitutional grounds -- should not be overstated. In fact, the two most prominent federal cases -- Gray[79] and Dinnan[80] -- were decided in favor of plaintiffs seeking discovery against institutional claims to privilege. McKillop,[81] a ruling following California rules of evidence, finds and recognizes the strong interest of a unique university in preserving its status; it does not find directly on the issue of academic freedom. Moreover, the McKillop court implied that less distinguished universities might not be able to mount a similar case for protection of their peer review systems.[82]

Discretion to protect academic freedom.

Certain distinctions have been drawn or implied between a blanket institutional right to academic freedom and the provision for institutional discretion to protect academic freedom. In several of the foregoing cases, these distinct concepts may have been confounded; i.e., the university may have been assumed to enjoy a right to academic freedom as a necessary concomitant to its role in protecting academic freedom. But recent cases suggest some unevenness in distinguishing between the traditional discretionary latitude afforded institutional officials and the greater presumptive latitude they might enjoy under the rubric of academic freedom.

The Second Circuit, in Lieberman v. Gant, upheld a district court's refusal to review qualifications of candidates for tenure, noting that the university enjoyed wide latitude and the discretion to use subjective judgments in making its tenure awards.[83] The court at least deeply implicated an institutional academic freedom:

> ....to infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom. [Citing Sweezy, supra] Although academic freedom does not include 'the freedom to discriminate,' this important freedom cannot be disregarded in determining the proper role of the courts called upon to try allegations of discrimination by universities in teaching appointments.[84]

This position sets out an academic freedom prerogative -- as distinct from a cognizable privilege -- as a restraint on judicial scrutiny of academic personnel decisions. The prerogative is an institutional one; the individual's interests are curtailed insofar as he/she must pursue a discrimination complaint under a burden made heavier by the presumed freedom of the institution to make subjective decisions.

More recently, a similar line of reasoning appeared in the decision in Martin v. Helstad.[85] In upholding a student's dismissal from law school, the court asserted that no hearing is required in dismissals involving academic judgments [citing Horowitz], and reasoned that, "The deference accorded academic dismissals is based on the policy of fostering academic freedom at the university level [citing Bakke]."[86] Judge Coffey, concurring, took at least as strong a position:

> ....academic freedom includes the right of a university to determine who may be admitted to study as well as a right to determine and direct its faculty and student body. The freedoms of inquiry, research, and thought, the life blood of academic freedom are of vital importance to not only the university administration, but also to the faculty and student body.[87]

This decision thus grants institutions an academic freedom prerogative that enjoys protection as either a "right," a vitally important value, or a policy. But it unambiguously sees the concept in terms which afford university administrations a protection based on academic freedom. The Coffey concurrence heads toward considerably more protection than has been discerned by others insofar as it alludes to the notion that institutional academic freedom may even preclude assertion of a property right to enrollment at a university.[88]

If Lieberman and Martin take a strong position on institutional academic freedom, other current decisions appear more "centrist" and moderate in finding a privilege. In these cases, judicial language becomes less vivid, but great deference is nevertheless shown to the exercise of institutional discretion. Selman v. Harvard Medical School, for example, cited the Bakke opinion regarding a university's "freedom" to exercise broad discretion in making admission decisions.[89] But it relied upon the more traditional "properly reluctant" judicial rationale for hesitating to intrude in academic decision making.[90] This "proper reluctance" is a more generally recognized and applied stance taken by the courts in any review of administrative actions. It is not necessarily based on a specific administrative freedom, but recognizes instead the public policy needs for administrative discretion, the proper delegation of administrative authority, and the courts' limited role in review of such actions.

If there are policy reasons for preserving administrative discretion in academe, at least one central reason is for purposes of protecting academic freedom. The First Circuit granted "wide discretion in making an initial tenure award" in Beitzell v. Jeffrey.[91] That discretion was

held to be required because the tenure decision grants considerable protection and freedom to the individual professor via a "long-term academic and financial commitment."[92] The university's "interests" and "needs" were held to be legitimate countervailing factors to be weighed against a professor's interests in procedural protection during the tenure-granting process.[93] The court acknowledged the important place of academic freedom in pursuit of the university's mission, and granted the university discretion in preserving the system by which academic freedom is assured.[94] "Security" and "freedom of expression" were held to be the end values of tenure, and are seen as components of the constitutionally protected function of universities -- "the vigorous exchange of ideas."[95]

Beitzell v. Jeffrey granted the assumption that a university has a legitimate discretionary role in establishing and protecting a system of individual rights to free expression. It further noted that academic freedom does enjoy a constitutional protection. But in the end, while ruling in the university's favor, the court did not precisely distinguish the locus of academic freedom as residing in the individual or in the institution. It did, however, distinguish between the latitude it was granting the university to protect and promote academic freedom, and the latitude the university could grant to individuals to exercise their rights to academic freedom.

The distinction is perhaps small, but it is crucial. The corporate interest in protecting academic freedom and the individual interest in exercising academic freedom were balanced in this decision, and the balance was struck in the context of the overriding social objective -- accomplishing the vigorous exchange of ideas.[96] This model provides for certain freedoms to be exercised by both institution and individual without spec-

ifying that one or the other is presumptively guaranteed an academic freedom right or privilege. Rather, there is an implied set of responsibilities and interests, all of which need to be exercised toward the end of accomplishing one higher-order constitutionally recognized value, namely the free expression of thought.

The centrist positions of the Selman and Beitzell courts can now be contrasted with Ollman v. Toll.[97] In this decision, a university president's refusal to approve a recommendation to hire a department chairman was analyzed in the more traditional fashion. Noting that the Supreme Court had "cautioned against further enlarging the judicial presence in the academic community," the district court simply declined to "second guess" the president's decision.[98] Academic freedom, per se, was not seen in this case to be an issue, although a measure of real judicial reluctance to intervene in academic decisions was evident. The traditional "reluctance" to intervene appears to be based on recognition that the authority and expertise required to run the academic enterprise rests most logically in institutional hands. In practical terms, one should note that the university's corporate interests prevailed in Ollman. It was not necessary to invoke a corporate academic freedom argument.

In this section, it has been established that various courts approach the question of latitude for institutional decision-making from different points of view about whether there is a corporate academic freedom, when and in what circumstances it should be invoked, and what ends the freedom serves. At one extreme, institutions are presumed to enjoy a corporate academic freedom; this presumption is almost universally traceable to the Bakke precedent.[99] At the other extreme, the more traditional discretionary

latitude afforded a corporate administration is recognized, but perhaps widened slightly in recognition of the unique character of academic decision making and the special expertise required. In the middle of the continuum, there prevails a view that the superordinate value to be protected is the free exchange of ideas; universities have cognizable interests in building and preserving a system which fosters that free exchange; individuals have cognizable interests in the security to engage in that free exchange. These interests are balanced by courts with the objective of fashioning the greatest protection for society's interest in the product of academic freedom. This "centrist" view has not clearly resolved the issue of where academic freedom resides in the final analysis. To a great extent, the key question remains to be addressed: how does one balance the rights of the institution against the rights of the individual?

Corporate vs. individual rights.

A potential issue in making the assumption that corporate rights to academic freedom protect, ipso facto, individual rights to academic freedom is the corollary assumption that individual and corporate rights are coincident. That is, by protecting corporate freedom, one has protected individual freedom. This issue has yet to be addressed head-on by any court, but several cases illustrate the problems that can arise.

The most prominent is State v. Schmid.[100] This case involved the conviction of a non-student for trespassing on Princeton University property. The case was decided on state constitutional grounds, and thus may lack precedential value or direct parallelism to federal cases. But the court's reasoning is instructive in looking at issues of institutional versus individual rights.

The Supreme Court of New Jersey provided Princeton (an intervenor in the case) with special latitude based on its historically private character, and based on the special educational function of the university.[101] But it also noted that private universities, "....in addition to their own protectible property interests, are committed to the achievement of important societal objectives which are generally consistent with First Amendment purposes....The public's invitation to use college facilities is incident to the educational life of the institution and must comport and be integrated with its educational endeavors."[102]

This holding distinguishes between individual rights to free expression and the institution's obligation to recognize those rights as it performs its special educational function. Schmid's conviction was ultimately overturned in part because Princeton's regulations covering visitors from off-campus did not provide for freedoms generally protected in First Amendment cases.[103] Significantly, the court refused to concede Princeton's contention that it enjoyed a corporate free speech right to control the educational environment. The court, as noted, did recognize Princeton's special purpose and function as an educational institution, but declined to find a free speech/academic freedom nexus for the latitude it might enjoy in regulating visitors to the campus.[104]

Acknowledging that Princeton may have (and be able to establish) substantial interests in protecting its educational environment, the Schmid case points out how that interest may come into conflict with the interest of an individual exercising a protected freedom. It was established here that Princeton's freedom in controlling its educational environment may allow it some latitude in formulating the traditional "time, place, and manner" regulation of speech.[105] It was also established

that Princeton should be held responsible for observing rights to free expression because its educational mission requires special latitude for expression; if the societal objectives of education are to be achieved, then, implied the court, universities must behave as if they were bound by the First Amendment's protection for pursuit of the truth. And so the corporate university must be bound to protect individual rights by limiting its own regulation of expressive activity.[106] On these distinctions turns a clear differentiation between the rights of individuals to freedom of expression and the rights of institutions to control expression.

Although in the Schmid case the balance was struck in favor of the individual, it is conceivable that the scales could swing in the university's favor in another case. What role, if any, would the idea of corporate academic freedom play in swinging the outcome? The Supreme Court in Widmar affirmed "....the continuing validity of cases....that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."[107] Whether the freedom to regulate for the purpose of assuring an effective educational environment equates to a constitutionally protected corporate academic freedom is less clear from the Court's opinion. However, Justice Stevens, in concurrence, cites both the Frankfurter concurrence in Sweezy and the Powell opinion in Bakke on the academic freedom point.[108] He would be inclined to use the academic freedom concept to give universities greater control over the content of expression than may be permissible in other public speech forums: "A university legitimately may regard some subjects as more relevant to its educational mission than

others."[109]

It is clear that no settled doctrine exists and that a continued competition of corporate and individual interests will further test the meaning of "academic freedom." What remains to be developed is the calculus for assigning weights to the respective interests. Perhaps the most recent word on this issue has been spoken by the Seventh Circuit in Dow Chemical Co. v. Allen:

> Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse. But what precedent there is at the Supreme Court level suggests that to prevail over academic freedom, the interests of government must be strong and the extent of the intrusion carefully limited.[110]

In this case, the appellate court overturned the lower court decision allowing access to research papers at the University of Wisconsin. The corporate university right to academic freedom ultimately served to protect the research interests of faculty, and illustrates a situation where both sets of interests were well-served by protections afforded to the university.[111] However, the court made it clear that the balance between corporate and individual interests has yet to be subject to a reliable balancing process.

Analysis and commentary.

Whatever else academic freedom may be, in legal terms it is a derivative of the constitutional protection afforded free expression. The issue addressed in this paper is whether in the derivation one can find a protection for institutions as well as for individuals. If such a protection can be found, how substantial and extensive is it, and what

is the appropriate balance between institutional academic freedom and the more commonly recognized individual right to academic freedom. Also, does the "academic freedom" of an institution need a more fundamental, constitutionally based, protection than may already exist in various forms? Several analytical pieces have now emerged in the literature to address these and related issues.

One troublesome issue arises immediately: prohibition of governmental infringement is the objective of protection afforded under the First and Fourteenth Amendments. The Princeton case involved a private university, arguably not subject to a finding of state action.[112] If private universities are treated differently from public universities, academic freedom may be applied with a double standard. It could, for example, be argued that private universities enjoy an institutional academic freedom while public universities do not. (A corollary of this reasoning would lead to the assumption that individual academic freedom might enjoy greater protection in public institutions than in private ones.) If that distinction is not drawn explicitly, then private institutions may still argue that as owners of private property they should be subject to a somewhat different standard of free speech protections for individuals on that property than should be the case for public (governmental) universities.[113] There seems to be more activity and more potential development of the law on this point at the state constitutional level than at the federal level.[114] The trend seems to be in the direction of broadening individual (vs. institutional) rights. Certainly under the New Jersey constitution, Princeton, a private university, is restricted from interfering in public speech to an extent equivalent to restraints on public institutions in other settings.

A second basic issue involves the conflict of institutional discretion with public law and policy. Specifically, can universities which, pro arguendo, enjoy a right of corporate academic freedom, find protections in this freedom that immunize them where strong countervailing public interests are at stake? The question of how to protect against sex and race discrimination in employment and in other facets of educational programs runs squarely into the notion of institutional academic freedom.[115] Although Bakke is cited as the source of precedent for an institutional academic freedom, that case did represent a victory of sorts for non-discrimination over institutional prerogatives.[116] Likewise, in Kunda v. Muhlenberg College, equal employment law overrode a claim to institutional academic freedom.[117]

Yet commentators are still able to take both sides of this question. Corngold argues strenuously against the recognition of any privilege against discovery in Title VII cases.[118] He concludes that deferential treatment of universities' interest in confidentiality of personnel files "....risk s protecting the illegitimate discrimination Congress, in extending Title VII to colleges and universities, sought to eliminate."[119] On the other hand, a 1981 California Law Review note argues that universities should enjoy a "qualified" academic freedom privilege against discovery in employment discrimination proceedings.[120] The weight in this argument is placed on the need to preserve academic freedom.

Perhaps the most extensive analysis is offered by Finkin, in which he concludes that an institutional academic freedom "is a desire in search of a legal theory."[121] Finkin points out that the theory does not observe key distinctions and assumptions, and that it fails to comport with aca-

demic common law. His main critique lies in the "extraordinary sweep" of the concept and its potential for permitting -- unnecessarily -- an overly broad and imprecise interference with previously established rights and liberties.[122]

Analytical treatment of the idea of institutional academic freedom has not to this date (with the exception of Corngold[123]) been supportive. Not only does there seem to be a judicial reluctance to give the idea more than an abstract recognition, but it is not clear that the concept has rooted itself as yet in the judicial mind. Although protection of individuals' rights to free expression, and the concept of the university as a forum in which those rights have a special place, have become commonplace elements in judicial thought, the granting of special constitutional privileges to the corporate university is as yet premature. This remain particularly so to the extent that alternative ways to protect society's interest in the pursuit of truth through educational institutions are available.

The reluctance to recognize a constitutional protection for institutional academic freedom does not seem unwarranted. Several clear problems are likely to emerge from any such recognition. One of the most troubling would be the need to draw distinctions among the academic and non-academic functions of universities. It could scarcely be argued that universities should enjoy a constitutional freedom where the public health and safety are involved. Yet presumptive freedom from building codes, from regulation of hazardous materials, and from protection of non-academic workers might be entailed in the kind of sweeping "academic freedom" provided for by a constitutional privilege. Might the freedom -- to take the issue a step or two toward the extreme --

be invoked to cover the management of corporate business and fiscal affairs? Could universities argue for exemption from employment laws, including collective bargaining legislation, on the basis of academic freedom? Would some courts draw lines inside the university to provide protection for corporate control over faculty in the name of academic freedom while limiting that control over non-academic employees? Current developments and current analysis leave these questions unanswered, yet the concept of a corporate academic freedom is pregnant with all of them.

Conclusion.

This paper has grappled with implications of an emerging legal concpt: institutional academic freedom. The concept was most clearly identified in Justice Powell's opinion for the majority in Bakke, and it has played a role in a number of subsequent cases. Although it appears that even the Supreme Court itself (in Widmar v. Vincent) recognizes that countervailing freedoms exist, it also appears that a new and very fundamental factor has been introduced to the balancing process among these freedoms.

Since universities already enjoy a measure of autonomy (albeit a varying measure, and far from absolute) the question has been raised as to what end an "academic freedom" for universities might serve. One argument is that universities vicariously exercise First Amendment freedoms for individuals to whom that benefit attaches. Another is that universities and individuals both assert society's interest in a free exchange of ideas, and consequently require the protection. A third point has been made that academic freedom assures that both universities and individuals will operate in the larger interest of society's support for free exchange of ideas.

In general, the notion of institutional academic freedom has achieved only a very qualified recognition among state and federal courts. The concept has been flatly rejected in some cases, but there is also evidence that Justice Stevens and others are sympathetic to development of the concept as a legitimate freedom for colleges and universities. This is a freedom that could achieve equal footing with constitutional protections afforded students, faculty, and others and create a field of rights to be tested and balanced by the courts.

At the root of the ambiguity over whether the institutional freedom exists is the legal ambiguity of the concept of academic freedom. That the First Amendment is protective of such a freedom has been fairly well established, although never in such definitive terms that looseness does not remain. Academic freedom developed originally as a matter of private law within the academic community; it was defined through a set of standards agreed upon and voluntarily subscribed to by faculty and the community of their employing institutions. The First Amendment, on the other hand, has contemplated primarily the more general societal objective of assuring the exchange of ideas. It has gradually accommodated to the special role of colleges and universities in furthering that larger objective. What appears to be happening now is a diversion of the courts' attention from the issue of whether protections afforded universities actually meet the test of preserving individual rights and furthering society's interest in free expression.

It is not difficult to construct a role for universitiesin achieving both academic and First Amendment objectives. It is also not difficult to show that universities have been granted considerable latitude in pursuing those objectives. It is more difficult, however, to grant a constitutionally based freedom to universities when that freedom may imply a

breadth and depth of discretion that would far exceed either historical or current experience. We may soon find a judiciary and an academic community jousting over just what academic freedom actually means.

FOOTNOTES

[1]Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[2]Id. at 312.

[3]Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[4]Bakke, supra at 312. See also, Keyishian v. Board of Regents, 385 U.S. 589 (1967); "[Academic] Freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." at 603.

[5]Cf., O'Neal Smalls. A legal framework for academic freedom in public secondary schools. 12 Journal of Law and Education 529 (1983): "....Academic freedom is often viewed as a privilege of the teacher....Like the special immunity or privilege claimed by the lawmaker, the judge, the lawyer, the clergyman or the doctor, the teacher claims academic freedom not merely for his protection. At bottom, it reflects a judgment that protection from intimidation and undue interference must be afforded to professional individuals in order to implement important societal interests." at 547.

[6]Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94 (1952).

[7]See G. Edward White. Earl Warren: A Public Life. N.Y.: Oxford University Press, 1982. White notes that "....Warren felt bound, as a judge, to consider ethical imperatives in his adjudication; in his view, they deserved as much consideration as explicit constitutional language, and perhaps more. His principal concerns as a jurist were to discern the underlying ethical structure of the Constitution and to apply rigorously its ethical imperatives, even if such an application resulted in a failure to achieve orthodox doctrinal consistency." at 218.

[8]Sweezy, supra at 250.

[9]Id.

[10]Id.

[11]Id. at 255-267.

[12]Bakke, supra at 312.

[13]Widmar v. Vincent, 102 S.Ct. 269 (1981).

[14]Sweezy, supra at 262.

[15]Id.

[16]Id. at 263.

[17]Id. at 261-262.

[18]Id. at 250.

[19]Cf., Seymour Martin Lipset and David Riesman. Education and Politics at Harvard. N.Y.: McGraw-Hill Book Company, 1975. Referring to Senator McCarthy's apparently irrational suspicion of Harvard, the authors note, "The University symbolized two groups which he defined as un-American and corrupting of basic values, the cosmopolitan high status internationalist eastern WASP elite and the intellectuals. These challenged the verities of nationalist, traditionalist, conservative America, both the lower-middle class old-stock and the rising ethnics." at 192.

[20]Widmar v. Vincent, supra note 13.

[21]Id. at 278.

[22]Id.

[23]Id., citing Healy v. James, 408 U.S. 169 (1972). Note, however, that Healy took pains to establish generous boundaries with respect to content of speech, focussing on the limited rights of universities to preserve order via time, place, and manner regulations (187-193).

[24]Id.

[25]Id. at 279.

[26]Hastings Rashdall. The Universities of Europe in the Middle Ages. Oxford: Clarendon Press, 1936.

[27]Id. at 151.

[28]Id. at 165-166.

[29]Id. at 151.

[30]Id. at 427-428.

[31]Id. at 429.

[32]Id. at 426.

[33]Lyman Glenny and Thomas Dalglish. Public Universities, State Agencies and the Law: Constitutional Autonomy in Decline. Berkeley: Center for Research and Development in Higher Education, 1973.

[34]E.g., California Constitution, Article IX, § 9; Michigan Constitution, Article VIII, §§ 4,5,6,7.

[35]Cf., Regents of University of Michigan v. State, 235 N.W. 2d 1 (1975).

[36]Grove City College v. Bell, 687 F. 2d 684 (1982).

[37]Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (1968); Powe v. Miles, 407 F. 2d 73 (1968).

[38]The Trustees of Dartmouth College v. Woodward, 4 Wheat (U.S.) 518 (1819).

[39]New Jersey State Bd. of Higher Education v. Shelton College, 448 A. 2d 988 (1982).

[40]See generally, Harry T. Edwards and Virginia D. Nordin. Higher Education and the Law. Cambridge: Institution for Educational Management, Harvard University, 1979, pp. 80-131.

[41]Kay v. Board of Higher Education of the City of New York, 18 N.Y.S. 2d 821 (1940).

[42]Id. at 830-831.

[43]Id. at 830.

[44]For a statement of powers, see People ex. rel. Board of Trustees of University of Illinois v. Barrett, 46 N.E. 2d 951 (1943). Public laws may constrain institutional discretion or autonomy, cf., Rutgers Council of American Association of University Professors v. New Jersey Board of Higher Education, 312 A. 2d 677 (1973). But abuse of discretion and/or arbitrariness in the exercise of discretion may prompt judicial intervention; see State ex. rel. Bartlett v. Pantzer, 489 P. 2d 375 (1971). Likewise, a contention that basic liberties are at stake raises the likelihood of intervention; Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[45]Papish v. University of Missouri. 410 U.S. 667 (1973).

[46]In Keddie v. Pennsylvania State University, 412 F. Supp. 1264 (1976), for example, the court pointed out a legitimate need "to maintain a competition of different views in the classroom, and to prevent the use of the classroom by a teacher deliberately to proselytize for a personal cause....", at 1271.

[47] Defining a "college", the court in Princeton Township v. Institute for Advanced Study, 157 A. 2d 136 (1960), recognized it as an institution which "....in whatever mold it be cast is expected to be perpetual in its service and undeviating in its alternate purpose which is the elimination of the false and the fostering of the true", at 140. The court in Strastny v. Board of Trustees of Central Washington University, 647 P. 2d 496 (1982), recognized the need to preserve scholars' rights to further society's interest in pursuing truth: "Although academic freedom is not one of the enumerated rights of the First Amendment, the right to teach, inquire, evaluate, and study is fundamental to a democratic society. ....The safeguards of the First Amendment will be quickly brought into play to protect the right of academic freedom because an unwarranted invasion of such right will tend to have a chilling effect on the exercise of the right by other teachers", at 504. Also, in McAloon v. Bryant College of Business Administration, the court recognized the need to encourage the pursuit of truth through protection of tenure rights: "The function served by the grant of tenure is the preservation of academic freedom effected through the provision of job security. Scholars are thereby encouraged to vigorously pursue and disseminate research without fear of reprisal or rebuke from those who support conventional wisdom." 520 F. Supp. 103 (1981), at 106.

[48] Judicial reservations are outlined, infra, see text accompanying notes 89-98.

[49] Board of Curators of the University of Missouri v. Horowitz 435 U.S. 78 (1978), at 84-91.

[50] Faro v. N.Y.U., 502 F. 2d 1229 (1974); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (1977). But see also Powell v. Syracuse University, 580 F. 2d 1150 (1978).

[51] Even where constitutional autonomy is granted under a state constitution, the protections are not unlimited. Cf., Regents of University of Michigan v. State, supra, San Francisco Labor Council v. Regents of University of California, 608 P. 2d 277 (1980).

[52] See Endress v. Brookdale Community College, 364 A. 2d 1080 (1976).

[53] Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments. In AAUP Policy Documents and Reports, Washington D.C.: American Association of University Professors, 1977.

[54] Id.

[55] Id.

[56] Cf., Krotkoff v. Goucher College, 585 F. 2d 675 (1978); Browzin v. Catholic University, 527 F. 2d 843; but see Scheuer v. Creighton University; 260 N.W. 2d 595 (1977).

[57] See Matthew W. Finkin. Toward a Common Law of Academic Status. 22 Buffalo Law Review 575 (1973). But see W. Todd Furniss. The 1976 A.A.U.P. Retrenchment Policy. 57 Educational Record 133 (1977).

[58]In Re Dinnan v. Board of Regents, University System of Georgia. 661 F. 2d 426, cert. denied, 102 S.Ct. 2904 (1981). See also EEOC v. University of Notre Dame Du Lac, 551 F. Supp. 737 (1982): "....no academic privilege exists which would protect from disclosure the names and identifying information of the reviewers of academic qualifications for tenure....", at 745.

[59]Id.

[60]Id.

[61]Id. at 429-430.

[62]Id., citing Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967).

[63]Id. at 431.

[64]Id.

[65]Id. at 432-433.

[66]Gray v. Board of Higher Education, City of New York, 92 F.R.D. 87, rev'd, 692 F. 2d 901 (1982).

[67]92 F.R.D. 87, at 91, citing Keyishian, Sweezy, supra.

[68]Id. at 92-93.

[69]Id.

[70]Id.

[71]692 F. 2d 901, at 909.

[72]Id.

[73]Id. at 907, citing AAUP 1971 Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments

[74]386 F. Supp. 1270 (1975).

[75]Id. at 1275.

[76]Id. at 1277.

[77]Note: Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege. 69 California Law Review 1538 (1981).

[78]McKillop, supra, note 74, at 1274-1275.

[79]Supra note 66.

[80]Supra note 58.

[81]Supra note 74.

[82]Id. at 1275-1276.

[83]630 F. 2d 60 (1980).

[84]Id. at 67.

[85]699 F. 2d 387 (1983).

[86]Id. at 391.

[87]Id. at 397.

[88]Id. at 399.

[89]494 F. Supp. 603 (1980), at 621.

[90]Id.

[91]643 F. 2d 870 (1981)

[92]Id. at 875.

[93]Id.

[94]Id.

[95]Id.

[96]Id.

[97]518 F. Supp. 1196 (1981).

[98]Id. at 1217, citing Horowitz, supra.

[99]Bakke, supra.

[100]423 A. 2d 615 (1980), App. Dism., 50 U.S.L.W. 4159 (1982).

[101]Id. at 632.

[102]Id. at 624.

[103]Cf., Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980).

[104]See note: Testing the Limits of Academic Freedom. 130 University of Pennsylvania Law Review 712 (1982).

[105]State v. Schmid, supra, note 100, at 632-633.

[106]Princeton appealed the New Jersey decision with the U.S. Supreme Court. Complex jurisdictional issues reared their heads at that level, but the case was mooted by Princeton's revision of its regulation governing distribution of literature on campus. 50 U.S.C.W. 4160.

[107]Widmar v. Vincent, supra, note 13 at 278.

[108]Sweezy v. New Hampshire, supra, note 3, Bakke, supra, note 1.

[109]Schmid, supra, note 100, at 279.

[110]672 F. 2d 1262 (1982), at 1275.

[111]Cf. Andrews v. Eli Lilly and Co., Inc. 97 F.R.D. 494 (1983). Full entry to research files was denied on several grounds, among them "....a compelling social interest in promoting research." At 500 (following Dow, supra, note 110).

[112]Cf., Braden v. University of Pittsburgh, 552 F. 2d 948 (1977); but see Rackin v. University of Pennsylvania, 386 F. Supp. 992 (1974).

[113]See note 104, supra.

[114]Id.

[115]See note: Academic Freedom and Federal Regulation of University Hiring. 92 Harvard Law Review 879 (1979).

[116]Bakke, supra.

[117]621 F. 2d 532 (1980).

[118]Eric Corngold. Title VII and Confidentiality in the University. 12 Journal of Law and Education 587 (1983).

[119] Id. at 607.

[120] See note 77, at 1555-1561.

[121] Matthew Finkin. On 'Institutional' Academic Freedom. 61 Texas Law Review 817 (1983) at 856.

[122] Id. at 855-857.

[123] See note 118.